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The Kenyan Constitution and the Question of Succession: The influence of a strong leader

by Barbara Kelley

Mzee Jomo Kenyatta, President of the Republic of Kenya, is over eighty years of age. The prospect of the people of Kenya having to select a successor to President Kenyatta raises fundamental questions regarding the status of Kenya's constitution in terms of its having assumed, in the minds of Kenyans, the aura of legitimacy to the extent that they will accept its mandate as the supreme law. This paper will be an attempt to analyze, first, the process of legitimization of the Kenya constitution, specifically in regard to the provisions for succession to the presidency; and secondly, to ascertain what, if any, perceptions derived from the analysis are, or could be, applicable to other developing African countries experimenting with various constitutional arrangements.

To date, there has not been a presidential election or a serious challenger to Kenyatta's authority and power. Hence, the analysis must proceed upon an examination of other elections and the extent to which the constitution has served as the base of legitimacy for those elected and just as important for those defeated.

As has been recognized by serious students of the developing African nations, the present course of action pursued by the governments of these developing countries is influenced and, often, even established by the colonial legacy. In terms of the viability of the constitution of the Republic of Kenya, that statement is especially true.

The direction and goal of Kenya's fight for independence, as was the experience of most English-speaking colonies, was that of a battle for control of the national destiny within the framework of a constitutional parliamentary system modeled on the English tradition. Kenya's journey down the road to independence began in earnest after the uprising of the Mau Mau Rebellion of 1950-1952. Before that period, the beginnings of a political consciousness or awareness on the part of several groups had developed along tribal lines and found expression through various quasi-political organizations on the local level. During the period of 1952-1960, the politicization of Kenyans was increasing, and agitation for self-government had aroused reaction. The response of the English was to ban African political parties altogether or, alternatively, to restrict political activity to a local, or tribal, basis. In addition, the attempt was made, and successfully so, to channel African political activism into the existing governmental structure by the creation of various advisory commissions and quasi-legislative boards,

to which the Africans were given representation by Africans or (even) white settlers. Such bodies, nominated by the Governor-General, had no power other than the ability to speak with impunity for the cause of Kenyan independence.

It was not until 1960 that the nationalist movement really manifested a semblance of nationwide effort. In that year the ban against national political parties was removed and the Kenyan African National Union (KANU) and the Kenya African Democratic Union (KADU) were formed. The fundamental source of division within the nationalist movement which produced two African national political parties was essentially tribal interest, which, in turn, was an expression of the land problems. The predicament of colonial Kenya was further complicated by the widespread presence of white settlers who, through the authority of the colonial government, had alienated enormous amounts of Kenya's best farm land and established an extensive system of plantation farming. Such alienation had dire repercussions for the Africans in that, to accommodate the settler's labor problem, they were forced into reserves. Massive resettlement of whole tribes of Africans ensued. The Kikuyu, the largest tribe in Kenya, perhaps feeling the pinch of land shortage the hardest, responded with the Mau Mau Rebellion. Though the Kikuyu discontent over the issue of land alienation was perhaps the most publicized by reason of the Rebellion, other tribes in Kenya existed and suffered under very similar circumstances. Though the several tribes had been estranged from their traditional lands, they did not relinquish their claims to such lands. Hence, the alliances behind the two nationalist political parties can partly be explained in terms of land and partly in terms of fears, on the part of the smaller tribes, of Kikuyu and Luo (the second largest tribe in Kenya) domination. Thus, KANU represented an alliance between the latter two tribes and KADU, an alliance between the remaining smaller tribes which had some support from the English settlers, who in their view, had similar interests to protect, specifically, insuring the inclusion of some provisions in the independence constitution for the protection of rights of minorities.

It was necessary to relate to some degree the basic issue of the political alliance of black Kenyans because the independence constitution would be a reflection of a compromise on these issues.

In 1962, the Lancaster House Conference was held in England; wherein negotiations were conducted on the substance of the independence constitution.¹ At the outset, the basic political issue between KADU and KANU was, respectively, regionalism vs. centralism. Other minority interests represented at the conference were the Asians, Arabs, and Somalis, who all espoused regionalism over centralism. The feeling among these groups as well as in KADU was that they could better protect their interests in a particular area if control and power of government was vested in a regional governmental body rather than in a body governing out of Nairobi. The argument for regionalism carried the day to the extent the constitution reflected the establishment of regional governments and a dispersal of power to such assemblies, both concurrent with and exclusive of the powers granted the central administration.²

However, during the negotiations there appeared to have been no serious inquiry as to what such a structuring might mean in terms of actual operation of the governmental apparatus in the future. As surmised by one author,

It is obvious from an examination of the powers of the Regions that they were not very important and were in any case precarious, for the Centre could take over

only regional powers in a number of instances. There was very little true autonomy. The regional executives were so designed as not to lead to strong regional governments; they were clumsy and unwieldy; there was a wide dispersion of authority and no clear lines of responsibility. This was likely to result in weak regional structure and to promote occasions for outside interference.³

Whether Kenya as an independent nation could have realistically functioned under such a structure was a question which fortunately it never really had to confront for reasons which will be explained later.

Under the independence constitution of Kenya, the central administration was bicameral—a House of Representatives and a Senate. The Senate's function was essentially that of a watchdog of these special provisions for the protection of rights of minority groups and of the regional governments.⁴

Pursuant to the independence constitution of 1963, Kenya continued to be a part of the British Commonwealth, specifically as that of a protectorate. That document also provided that the executive authority would be vested in Her Majesty and exercised on her behalf by the Governor-General, who in turn, would appoint a prime minister, "a member of the House of Representatives who appears to him likely to command the support of a majority of the members of that house."⁵ The Governor-General, with the advice of the prime minister, would also appoint other cabinet ministers from among the members of the two houses of the National Assembly.⁶ The constitution also provided for the selection of members to the National Assembly, via direct election by the populace, the division of the country into constituencies for election to both the Senate and the House of Representatives, and for the terms of office of members of the National Assembly.⁷

The final leg of the journey to independence was the selection of the party which would have the authority to assist the Governor-General in the formation of the government. The battle was between KANU, KADU, and APP, a dissenting group from the Kamba tribe; the major issues were, basically, (1) regionalism vs. centralism; (2) the Kitale question, which involved an area of fertile land which attracted numerous white settlers and to which several tribes asserted claims (for KADU, Kitale became a rallying point for regionalism); and (3) the question of having British military bases in Kenya, particularly around Nairobi.

Tribalism, which played a large role in the campaign conducted by the three parties, can be understood partly by the fact that the issue of regionalism vs. centralism was essentially an expression of economics. Land in Kenya not only played a central role in terms of tribal custom and culture, but also, in this agricultural country, in terms of economic growth and progress. Hence, the claims to land, which were usually expressed in terms of traditional tribal use, were also a claim to a share in the economic benefits which hopefully would accrue to black Kenyans upon the expected departure of many English settlers.

Kenyatta, Mboya, and Odinga ran on the KANU ticket. Jomo Kenyatta was a Kikuyu who had attained a tremendous amount of prestige and national stature from his association with the Mau Mau and his years in detention. Tom Mboya and Oginga Odinga were Luo. Mboya had established a political base and reputation along non-tribal lines, and Odinga had received his political training among the Luo. Much lesser known but generally competent men were running on the KADU ticket. In that election some 2,659,700

people were registered, although only 1,843,879 actually voted. Out of that election, for the House of Representatives, KANU won 72 seats, KADU, 32, and APP, 8. The final tally of the House by independence day was as follows: KANU—98 (result of a merger with APP and “national elected” members selected by the House acting as an electoral body); KADU—36. The Senate, as a result of the election, the merger with APP, and a defection to KANU by a KADU member, totalled 23 KANU adherents and 15 KADU.⁸ Jomo Kenyatta was selected Prime Minister by the Governor-General, and on December 10, 1963, Kenya was declared independent.⁹

Since the promulgation of the 1963 independence constitution, that document has been amended 10 times up through 1969. That raises significant questions regarding the status of the constitution. As has been noted previously, the independence constitution was the expression of a political compromise between the advocates of regionalism (KADU) and centralism (KANU). In view of the fact that KANU won a majority of members of both houses in the legislature and to the extent that KANU was unalterably opposed to the provisions in the constitution establishing the regional governments, it could be fairly expected that an essentially KANU government would not seriously consider actually implementing those provisions and others which were essentially a compromise by the British government between KANU and KADU. As succinctly stated by Ghai and McAusland, “KANU had never believed in this constitution, and it is therefore not surprising that no serious attempt was made to implement it despite an assurance by Prime Minister Kenyatta in October of 1963 that power would be delegated to the regions as specified in the constitution.”¹⁰

Another observation by those same authors, and which is deserving of some consideration, is that the independence constitution was never intended by any of the parties to the negotiations to be the permanent government instrument of Kenya. It was only intended to serve as a framework or structure which the new government could utilize as a starting point to gradually adopt a constitution to accommodate the needs of the country. Of course, under that view, such needs would necessarily be interpreted from the vantage point of the ruling party.

An examination of the ten amendments and the circumstances surrounding their passage will shed some light upon the question of the legitimacy of the constitution in the minds of Kenyans generally and the various leaders specifically. At this point it may be relevant to note that Kenya has only been in existence as an independent nation for close to nine years. Consequently, one could not reasonably expect the constitution to have attained a position of near-religious reverence in the minds of Kenyans comparable to the attitude of most Americans toward their country’s constitution. The inquiry as to the legitimacy of the Kenyan constitution must therefore be addressed to the inclination, or, more appropriately, the disinclination of Kenyans generally and the leaders specifically to seek other means through which to resolve political disputes and conflicts.

In November of 1964 two significant events occurred: first, the dissolution of KADU was announced in Parliament, and secondly, the first amendment to the constitution was passed. Upon the dissolution of KADU, its members joined KANU, and Kenya became a de-facto one-party nation. Under the first amendment, Kenya was declared a republic with an executive president. Jomo Kenyatta became the first president. Included in that amendment was the procedure for selecting future

presidents.¹¹ Those procedures provided (1) for an election; (2) that a candidate for presidency also had to be a member of the House of Representatives and the nomination had to be supported by 1,000 registered voters; (3) that the presidential candidate who, having won the seat in his constituency, also received a majority of votes from the members of Parliament, would be declared president. In other circumstances such as the death or resignation of the president, the House of Representatives, acting as an electoral college, would select a successor. The first amendment also removed the entrenched powers of the regions. It bestowed upon the president the authority to appoint a vice-president from the elected members, who would act as an assistant to the president but who would not automatically succeed him.

The second and third amendments completed the process begun through the first, of totally eliminating the provisions of the constitution which established regionalism by virtue of the regional governments and their respective powers. In December of 1964, amendments were passed concerning the relationship between the central government and the regions.¹² The third, promulgated in June of 1965, abolished entirely the specially entrenched provisions in the constitution; and those sections regarding the executive power of the regional councils, renamed them Provincial Councils and conferred upon Parliament the authority to relegate to the Provincial Councils their various functions.¹³ Arguably, the most important portion of that amendment was the alteration in the amendment process itself. Pursuant to the Third Amendment Act, the parliamentary majority required for a constitutional amendment was reduced to a 65 percent majority in both houses. Previously, a majority of 75 percent was required in both houses and for amendments concerning the specially entrenched provisions, a majority of 90 percent was required in the Senate and 75 percent in the House.¹⁴ In addition, the requisite parliamentary majority for declaration of a state of emergency was reduced from 65 percent to a simple majority, and the period after which a parliamentary resolution must be sought was extended from seven to twenty-one days. The fourth amendment, announced in April of 1966, dealt with eligibility of commonwealth citizens for Kenya citizenship; criterion for loss of a seat by a member of Parliament; and public service tenure which is to be at the pleasure of the president.¹⁵

An amendment of particular interest was that promulgated on April 30, 1966, which required a member of Parliament to vacate his seat if he resigned from the party that had supported him at the time of his election.¹⁶ On April 20, 1966, twenty-nine of KANU members of Parliament, including Vice-President Oginga Odinga, resigned from that party and crossed the floor of Parliament as an opposition. That act was an expression of dissent with the views and policies of the government, particularly the role that African socialism would play in the development of Kenya, but more importantly, the definition of African socialism in terms of its actual implementation in Kenya. Related to that issue was Kenya's political alliance or alignment in the international political arena. Kenyatta and his government were associated with the west, whereas Odinga and his followers were associated with the east. Another bone of contention was the alleged disparity between the economic growth and development of various regions. The Kenya government had not yet solved the problem of the method and means of land distribution. The fundamental issue in this regard was that of the terms by which the

government should dispose of the available land.¹⁷ This latter conflict was essentially an expression of tribal fear. As described by Cherry Gertzel, which deserves to be quoted fully:

This debate (governmental policy on allocation of resources) was conducted in terms of regionalism and ethnic interests; and it resulted in the expression of fear of Kikuyu domination. These fears were expressed generally and so went beyond KANU. . . So pronounced did allegations of specific Kikuyu dominance become in Parliament that a point was reached when the Speaker ruled that further reference to this subject would be out of place. . . Tribalism, if it represented anything, represented fears of economic neglect. The antagonism expressed toward the Kikuyu was not merely or even primarily a tribal legacy rooted in divergent loyalties. It was closely related to concern for the present. It was the contemporary issues and conflicts directly related to Kenya's economic development that raised these fears of dominance by one tribe in all aspects of Kenya's life: in government, commerce, and business.¹⁸

Another political party was formed—the Kenya Peoples' Union (KPU)—with Oginga Odinga as the leader. In accordance with the new amendment, the members of Parliament gave up their seats, which necessitated elections to fill the vacancies. That election became known as the "Little General Election" because it represented a cross-section of regions wherein the land issue was of some concern to the citizens.¹⁹ As a result of the election of 1966, nine of the twenty-nine seats—seven House and two Senate—were filled by KPU candidates, although, according to the Standing Orders, that did not constitute the minimum required for an official opposition party. Nevertheless, KPU was granted the status of a parliamentary party and an unofficial opposition.²⁰ The fact that this group of members of Parliament, some of whom were unalterably opposed to certain governmental policies, chose to express their dissent and opposition through the existing governmental system and to abide by the very constitutional mandate which had been directed specifically against them bespeaks of at least a beginning of the process of legitimization of the constitution.

On April 28, 1966, the same day the members of Parliament crossed the floor, Tom Mboya, one of Kenyatta's closest followers, announced an amendment to the constitution. In this instance, the government accelerated the amendment process and adopted a constitutional provision in direct response to what may be termed a political challenge to the government. However, that fact in and of itself may not be as significant in regard to the legitimacy of the constitution as the fact of the Little General Election. That event proved that a political question could be resolved consistent with the constitution. Such cooperation to abide by the Constitution is described by David Koff:

There are signs that the roots of this cooperation lie in Kenya's economic and social system, in the position which the more powerful tribes occupy within it and the elite which the system supports. The growing commonality of interests among the elites—the political, economic, military and bureaucratic—in maintaining the existing system does not depend entirely upon one man. . . Thus, while the succession question will probably raise strong issues of personality, the government's performance throughout the period of the Little General Election suggests that the question can be resolved without the intervention of non-political elites,

a breakdown of administrative control, or the fragmentation of the state into tribal units.²¹

The sixth amendment, passed in June of 1966, limited the president's ability to contravene fundamental rights such as freedom of movement, expression, etc., under the exercise of his special powers provided by the Preservation of Security Act.²² The seventh amendment of January, 1966, abolished the Senate and effectuated a merger of the two houses, the result being that Kenya now had a unicameral legislature. This amendment, along with the ninth which abolished the provincial councils and deleted all references in the constitution to the provincial and district boundaries, buried the remaining vestiges of regionalism.²³

Perhaps the most important constitutional amendment for purposes of this paper was that of July, 1968.²⁴ Through that amendment Parliament altered the method of both election of and succession to the presidency. As to the election of a new president, the amendment provided (1) that every political party would be required to nominate a candidate for the presidency; (2) that all candidates at the time of the election would have been nominated by a political party; and (3) that the president would be elected by the national electorate at large. In the case of the death, resignation, or other circumstances other than dissolution of Parliament, rendering the office of president vacant, the vice-president would function as president with certain specific limitations, and an election be held within ninety days after the vacancy occurred.

The new amendment thus introduced the semblance of a primary election via the requirement that all presidential candidates be nominated by a political party. In that same year, 1968, new regulations were introduced which prevented any candidate from standing as an independent in a local government election. In addition, in December, 1968, President Kenyatta announced intentions to institute a system of primary elections. These new amendments and regulations could be interpreted as a design on the part of the government to "broaden the basis for selecting candidates in both national and local elections"—as is the impression of one writer.²⁵ It may also be seen as a maneuver on the part of Kenyatta's government to force allegiance to one party or the other, thus indirectly capitalizing on Kenyatta's personal popularity and utilizing the fact that KANU is, and presumably will continue to be for at least some time in the future, the dominant party in the country, thereby making available to the government a valuable propaganda tool of portraying the minority party as destroying the unity of Kenya and attempting to undermine the government, as was done to some extent during the 1966 campaign. If one accepts the latter approach, then again the constitutional amendments were the reflection of a subtle power play and a response to political events affecting, implicitly, the status and power of the government and, hence, KANU.

During August of 1968, a general election was held which involved 1,900 seats in municipal and county councils throughout the country. The campaign involved issues of national concern; thus, the country experienced the first nationwide contest between KANU and KPU. The manner in which the election was conducted is of some major concern in regard to the acts of the government and the response of those affected. In that election the district commissioners, who were all public servants and hence whose job security was controlled by the president, declared a vast majority of the nomination papers of the KPU candidates invalid, usually on very technical grounds. An illustrative

example is a situation where the initials "O.O." were signed instead of the full name, Oginga Odinga.²⁶ There was protest from various segments of the population, and Odinga threatened to bring legal action against the government, but did not carry it through. The results were that very, very few of the KPU candidates were elected. In spite of the protest, no action was taken against the government, and no corrective measures were initiated or undertaken by the government. An interesting fact, in view of the experience, is that since August of 1968, many of the KPU supporters have re-joined KANU. Furthermore, the implications of the response of KPU are significant and will be explored in conjunction with the effect of Kenyatta's charisma on the legitimization process.

An occurrence which assumed the magnitude of a national crisis heretofore unexperienced by the Kenyatta government was the assassination of Tom Mboya in 1969. Mboya, at the time of his death, was the Minister of Planning and Development. Unlike Odinga, Mboya's success was not derived from his tribal, Luo, ancestry; he had carved a reputation as a "nationalist" and played an invaluable role during the interim of Kenyatta's detention arising out of the latter's alleged association with the Mau Mau. Mboya had become an integral part of Kenyatta's governmental machinery and often introduced executive bills which were expected to be controversial and which met with substantial opposition, e.g., the bill requiring members of Parliament to give up their seats upon resignation from the party under which they were elected. Tom Mboya and Oginga Odinga were long-time bitter enemies, and although many Luos followed the former in support of Kenyatta's government, there were still many who considered Mboya a traitor to their tribe. However, given the existing fear among the Luo tribe of Kikuyu domination, Mboya's assassination became a catalyst for tribal unity among the Luo, and he, a tribal hero. There were rumors circulating that the Kikuyus in the government had ordered his death, and the fact that a Kikuyu was arrested as a suspect gave some credibility to that rumor. Too, the suspect stated he killed Mboya on orders of the "big man," although he did not establish the identity of such person, nor were courses pursued to ascertain such identity or even his existence. Therefore, in their anger and fear, the Luo rallied behind Odinga as an expression of their rejection of a Kikuyu-dominated government.

Following this display of Luo unity, the entire country was thrown into a state of instability which could have resulted in rebellion or a coup. As is apparent, that occurrence did not materialize. The reaction of the Kikuyu was again to resort to oaths as a means of solidifying their strength, as they did during the earlier Mau Mau Rebellion. In turn, the unity of the Kikuyu frightened and angered many of the smaller tribes, who responded by also bringing an assertion of tribal loyalty for strength. Kenyatta placed the responsibility for the outburst of tribal tension upon Odinga and banned KPU. He also detained Odinga and several other KPU members. Amazingly, Kenya then calmed down, and tensions eased. In an attempt to explain the absence of open rebellion, Stanley Meisler observed that traditional African society in Kenya respected authority, and Kenyatta had asserted his authority in an "uncompromising" manner.²⁷ The Luo are emotional but yet accept adversity in a fatalistic way, and, though bitter, the events were not such as to provoke them into a mood of active rebellion. Much more plausible, in my view, is the observation that, unlike the Ibo of Nigeria, for instance, the Luo did not have a means to rally the tribe on a national scale. Speculating for a moment, it might have

been a different situation had the provisions in the constitution establishing the regional governments been implemented. Another rationale set forth was the effect upon the Luo reaction of the detention of Odinga. Meisler contends that Odinga's absence enabled a group of younger, better educated Luo to surface who felt the need to align themselves with the government in order to accomplish their goals instead of alienating themselves from it. In Meisler's words, "they counselled patience."²⁷

An even more interesting phenomenon was the government's response to the crisis, which was to dissolve parliament, which in turn necessitated national elections. As was to be expected, the campaign was conducted along tribal lines. Although only one party was involved, Kenyatta allowed many of KPU followers to run on the KANU ballot. But as there was only one party officially participating in the election, there was no competition for the office of president and hence Kenyatta was re-elected automatically. The result was that eighty-two of the incumbent members of Parliament were defeated, which included every incumbent Luo member of Parliament.²⁸ In analyzing the elections of 1969, Meisler concludes that "...it was a shrewd political move by Kenyatta. It became a means for all the people of Kenya, whether Luo or not, to demonstrate their grievances and hostilities."²⁹ Moreover, the election may be interpreted as having functioned as a conduit of legitimacy. On the one hand, the willingness of the Luo to forego other alternatives and to utilize the elective process as defined in the constitution to express their dissent, demonstrated some degree of legitimacy in the minds of the native populace of the constitutional mandates which governed the situation confronting the country. On the other hand, much of the same could be said of the leaders of Kenya or, more definitely, those who were most capable of influencing the voting populace generally. They too demonstrated an attitude of acceptance of the constitution—at least to the extent of expressing their political and economic grievances through the machinery established by the constitution. Kenyatta himself personally displayed a sort of "faith" in the constitution or, more appropriately, "faith" in the populace to accept the constitutional mandate.

Given the positive attitude of the electorate toward the constitution as evidenced by an examination of the national and local elections in Kenya, the inquiry is then reduced to an analysis of the forces to which it may be attributable. Kenya's constitutional continuity and stability seems to a very large degree to flow from the charisma of President Jomo Kenyatta and the respect accorded him by the general populace.

Kenyatta's ties with Kenya's fight to independence are inextricably interwoven with that segment of Kenya's history. Kenyatta, who had distinguished himself intellectually during his early years, attained international recognition by his anthropological work on the Kikuyu *Facing Mt. Kenya*.³⁰ In his homeland he had become nationally known as a spokesman and representative of Kenyans to the English colonial government and was among the first advocates for the development of Kenya as a Black man's country. During 1950-52, the Mau Mau Rebellion, he became a national hero because of his alleged leadership of the Mau Mau. The Mau Mau Rebellion has been interpreted by both Kenyans and others as an early assertion of Kenyan nationalism; hence, Kenyatta became associated very closely with the development of that concept. Kenyatta during these times demonstrated to Kenyans his wisdom and determination in their fight against colonialism and emerged as somewhat of a father-figure for Kenya. Although Kenyatta has opposition, as he most certainly has in Odinga, those men are careful to express their disagreement in terms of

opposition to governmental policies and *not* opposition against Kenyatta per se. He is accorded respect and deference even by his most recalcitrant opponents. On many occasions when reconciliation between members of Parliament on questions of policy, passage of a bill, etc., seemed impossible, Kenyatta would personally appeal to the members of Parliament to accept the governmental position for the time being, and his success rate at such reconciliations has been impressive. The same has basically been true of his personal unifying effect on the party structure in Kenya. It was due primarily to Kenyatta's charisma that KANU was able to absorb KADU and APP. However, in regard to KPU, Kenyatta's charisma proved inadequate to resolve the conflicts between the leaders of that party and KANU.³¹ But even given the inadequacy of Kenyatta's personal influence to bridge this ideological gulf of KPU and KANU, his image and influence have been successful in containing such ideological differences within the established governmental structure. Kenyatta's charisma and its effect upon the national legitimization process of the constitution is susceptible to an analysis pursuant to the "indispensable" man argument. Such argument is relevant in the context of developing countries where the institutions are so unstable and fragile that it is only the presence of a national hero which gives them credence or legitimacy at all.³²

A very strong argument could be made that it has indeed been Jomo Kenyatta's charismatic qualities and his concomitant power to persuade and influence which have helped provide that degree of legitimacy and aura of respectability that has permitted the Kenya constitution to exist as a somewhat viable instrument of government. The real question, however, is not how Kenyatta's charisma has been the key to the legitimacy accorded the constitution in the past, but rather, how, given the inevitability of his absence either by death or resignation, the conveyance of the people's loyalties and respect from Kenyatta personally to the constitution itself or, more appropriately, to the idea of a constitution, may be effectuated. As aptly stated by McAusland:

The issue can be posed in modern phraseology as follows: what's the best way to routinize the charisma of the leader, that is, to transfer the loyalty and respect given to the leader to the constitutional system by which he obtained and through which he exercises his authority; by his retention indefinitely with or without election or by voluntary retirement or by means of election after he has served a limited period as chief executive.³³

Considering these alternatives in the particular context of the Kenya constitution, it is not entirely clear to what degree the "routinization" of the people's loyalty from Kenyatta to the idea of a constitution has been effectuated. The relative ease with which elections have been conducted and hence the succession mechanism for national and local offices implemented cannot entirely be attributed to Kenyatta's charisma. Hence, one vital question is: to what extent does his charisma not account for that phenomenon? Given that uncertainty, it is almost entirely impossible to ascertain whether implementation and compliance with the constitutional provisions regarding succession to the presidency will proceed as established by the relevant provisional document. It may very well be that the seeds of the idea of a constitution, and of its mandates governing the actions of both the government and the governed, have been sufficiently implanted as to ensure the continued existence of that idea.

An alternative course of action which would very likely contribute substantially to the legitimization process would be for Kenyatta to resign as president or allow elections for the presidency and, by his active support of or acquiescence to the new president and government, bestow upon the constitutional system an aura of credence and legitimacy which would undoubtedly bolster the validity of the system in the minds of Kenyans.

The question of utilizing a leader's national charisma to assist the legitimization of a constitutional system which is foreign to the traditional systems of government in a developing African nation raises significant issues dealing with (1) the problem of tribalism, with which nearly every such nation is confronted; (2) the definitive posture of a constitution within these countries; and (3) the willingness of a leader to relinquish power to do this.

As the discussion within this paper has attempted to convey, tribalism is generally an expression of political, economic, or social grievances within the context of a transition from the colonial governing structure to that of an independent nation. As with the situation in Kenya, tribalism is not a reflection of historically deep-seated conflicts between the tribes which comprise the nation's populace. Rather, it is a reflection of the inherent conflict in efforts to establish a national social consensus—given the pragmatic question of land ownership and the persistent problems still remaining from the period of colonial rule. Hence the tremendous significance which the land question has assumed in Kenya is a direct result of the establishment of the plantation system of the white settlers and their policies of tribal resettlement. As noted previously, in terms of Kenya's economic development as an independent nation, it is dependent to a large extent upon the agricultural productivity of farmers. Hence, land assumes an importance apart from the traditional status of land within the tribal culture. Yet, because the government is an employer of some magnitude in terms of total percentage of employees in Kenya, the concern of the dominance of one tribe in the civil service bureaucracy, etc., is substantial. However, tribalism in Kenya springs from the perceived, or alleged, disparity of opportunity for economic growth and advancement by the Luo and the smaller tribes specifically in regard to the "favoritism" displayed toward the Kikuyu. The claim of Kikuyu dominance is somewhat substantiated by the following: in 1969, preceding the election of that year, seven of twenty-two cabinet members were Kikuyu; in the civil service, members of that tribe held nine out of twenty-two permanent secretaryships, which are the highest administrative post in the ministries; of seven provincial commissions, four were Kikuyu; they also head the police, Central Bank of Kenya, University of Nairobi, Industrial and Commercial Corporation, and the Kenya National Trading Union.³⁴ However, these facts are not necessarily indicative of a peculiar favoritism towards Kikuyu on the part of the government but rather a consequence of the disparity in the educational achievements among the tribes during the colonial regime. The Kikuyu were the most aggressive tribe in Kenya and became the most educated. As a consequence, during the colonial administration they occupied a disproportionate percentage of the positions in the civil service bureaucracy allocated to Africans in the pre-independence period. In terms of the implications of the effect of tribalism upon the legitimization process of a constitutional system such as Kenya's, it would seem that a conscientiously executed plan of an egalitarian allocation of resources or access to resources among the tribes should be implemented by the government in the constitution as far as possible within the structure of the particular national economy.

Of course, there are barriers or obstacles to be overcome, but such obstacles would usually be the result of a lack of sufficient network communication and/or mutual understanding between the governors and the governed.

Contrary to the views of many writers on the subject, tribalism will not disappear or fade into obscurity by ignoring it or proceeding as if it did not exist. It must be considered along with the economic, political, and social problems. The issue of tribalism and of coping with its divisive effects has a tremendous impact upon the posture of the constitution in newly developing African countries. As has been noted previously, there have been several instances which imply that the constitution may be nothing more than a glorified piece of legislation. From a western (American) perspective, that implication may raise questions as to whether the Kenya constitution is really a constitution for the reason that it has been amended so frequently and is apparently too susceptible to political manipulation. However, before such criticism can be made one must consider the historical development of the constitution in America as opposed to that in Kenya and the enormous temporal differential between the two. The American constitution was promulgated in 1791 by settlers who had previously been inculcated with and socialized to the idea of a constitutional system. On the other hand, Kenya's first experience with a constitution occurred within the last stages of the colonial occupation; her first experience as an independent nation occurred only nine years ago. The earliest experience of any African country with a constitution as an independent country was Ghana's in 1959. The time differential alone would sufficiently negate any valid comparison between the constitution in America and that in the new African nations, aside from the political and economic atmosphere which prevailed during the periods of their respective adoptions. Given the distinction between the political and economic atmosphere, it may even be questionable whether the idea of a constitution as it exists in the United States is appropriate for newly developing African countries specifically in terms of meeting the needs of a country during the present day and age. The prerogative of promulgating a highly idealistic document proclaiming very abstract normative standards may not be within the realm of realistic alternatives available to present-day African leaders. It would appear that a document similar to the Kenya constitution would be more applicable. The rapidity with which changes occur and the frequent shifts in the balance of power would seem to require, or even demand, documents which were both resilient and yet flexible. As it is humanly impossible to predict with any certainty the issues and questions which would confront a developing country in Africa in the immediate future, it would hence be impossible to draft a constitution which would be capable of presenting a response or solution to such problems. That same observation could have been made of the Constitutional Convention in America, but again, it must be kept in mind that the drafters came to that convention in a frame of mind and general orientation distinctively different from that of the African leaders today. In view of the above, one might argue, then, why the need for a constitution at all if it's only glorified legislation? However, that response ignores the need for a general sense of direction, i.e., constitutive expectations in a society, upon which there can be established a national consensus which might not be fulfilled through separate legislation. The need for a constitution is somewhat analogous to that of thread holding the fibres of material together.

In terms of utilizing the charismatic qualities of a leader to and in the legitimization process, it would be difficult, if not totally unrealistic, to provide for such in a constitution. Some, if not most, African countries do not possess a leader of Jomo Kenyatta's stature and power. It would thus be impossible for such countries to consider such a course of action. For these countries which are so endowed, it may not be to their best advantage to incorporate the leader's charisma as a part of the constitutional mandates. At most, the presence of such a leader is, in terms of drafting a constitution, an incidental fringe benefit which eases the transition from a tribal based system to a viable constitutional system. The problems of drafting a constitution which would have a probable chance of success in terms of attaining legitimacy in the minds of those whom it is to govern would seem to best be resolved by a realistic determination of the issues which concern the development of the country as perceived by the leaders and as reflected by the sentiments of the people. An example where this was not done was the 1963 Independence Constitution of Kenya. (see *supra*.)

It is the opinion of the writer that such a determination should include (1) some conscious effort toward analyzing the roots and causes of tribalism within the particular country and (2) a plan or scheme to combat and eventually minimize its potential divisiveness. It is also the opinion of the writer that the total elimination of tribalism as a goal today is unrealistic because such an objective would essentially demand that the people forget their roots—which in some aspects is similar to whites in America asking blacks to forget they are black and just be Americans.

The question of the success or failure of imposing a constitution as the "guiding light" in the government of newly developing African countries is a question of the successful integration of a myriad of forces and factors whereby the populace—and especially, the leaders—will become amenable to a reorientation or resocialization of values and goals.

FOOTNOTES

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